No. 99-1177

FILED
FEB 10 2000
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

DENNIS D. CHRISTENSEN, M.D.; and BERNARD SMITH, M.D., on behalf of themselves and their patients seeking abortions,

Petitioners,

—v.—

JAMES E. DOYLE, in his official capacity as the Attorney General of the State of Wisconsin; and DIANE M. NICKS, in her official capacity as District Attorney for Dane County and as representative of a class of all District Attorneys in Wisconsin,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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Petitioners Christensen and Smith ("Petitioners") respectfully submit the following brief in reply to the Combined Memorandum of Respondents ("Comb. Mem."), which acknowledges that certiorari should be granted in this case.

Petitioners agree, of course, that certiorari should be granted. Nonetheless, Petitioners believe that the interests of judicial economy would best be served if this Court defers consideration of the Petition until after it decides *Stenberg v. Carhart*, *cert. granted*, 68 U.S.L.W. 3449 (U.S. Jan. 14, 2000) (No. 99-830), because the decision in that case is likely to be dispositive of the issues presented in the Petition. Neither the text of the Wisconsin statute nor the evidence presented at trial in this case is sufficiently different from the statute and evidence in *Stenberg* to justify accelerating review in this case.

The primary difference pointed out by Respondents between Wisconsin's statute and Nebraska's is that Nebraska's statute employs the term "substantial portion," whereas Wisconsin's statute does not. *See* Comb. Mem. at 5. But, as the Eighth Circuit concluded in a companion case to *Stenberg*, the term "partially" results in a statute encompassing as many abortion methods as does a statute using the term "substantial portion":

> The problem here is the word "partially." In the context of the Act, "partially" is not appreciably different from "substantial portion." The effect is the same. A physician who, as part of a D&E procedure, or as part of a suction-curettage procedure, brings an arm or a leg or some other part of a living fetus out of the uterus into the vagina will violate the Act.

Little Rock Family Planning Services v. Jegley, 193 F.3d 794, 798 (8th Cir. 1999).

Nor does the Wisconsin statute differ from Nebraska's, as the Respondents claim, because it "requires the delivery of an intact body into the vagina." Comb. Mem. at 5 (citing Wis. Stat. § 940.16(1)(b)). The Wisconsin statute requires only the partial vaginal delivery of a "living child." *See* Comb. Mem. at 5 n.2 (actually quoting Wis. Stat. § 940.16(1)(b), which makes no reference to "intact body"). It is undisputed that in many suction curettage and D&E abortions that involve dismemberment of the fetus, and in some induction abortions, the fetus is living after it is partially delivered into the vagina. Comb. Mem. at 7a, 9a, 16a (Amended Stipulation of Facts ¶¶ 28, 37-38, 74).

Moreover, according to Respondents, the primary evidentiary difference between this case and *Stenberg* is that "evidence presented at trial in Wisconsin showed the Legislature intended to limit only one method of abortion, known to physicians as 'dilation and extraction' or 'D&X' and to laypeople as 'partial-birth abortion.'" Comb. Mem. at 6 (giving no citation to record). In fact, however, the evidence regarding legislative intent is to the contrary: the Wisconsin Legislature rejected amendments to the statute that would have limited its scope to the D&X techniques. *See* Plaintiffs' Exhs. 5 (Senate Amendment 5) & 11 (Assembly Amendment 4);[1] *see also* Comb. Mem. at 10a-15a (Amended Stipulation of Facts describing range of definitions of "D&X").

If this Court determines that it should grant the Petition before deciding *Stenberg*, even though that decision will in all likelihood resolve the issues posed by this case, it should reject the Respondents' proposal that this case proceed on the

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[1] These amendments would have defined "partial-birth abortion" in a detailed manner similar to the definition of intact dilation and extraction employed by the American College of Obstetricians & Gynecologists.

same briefing schedule as *Stenberg*. Requiring Petitioners to brief their case on a significantly shortened schedule would prejudice their ability to properly present the merits of their appeal. It would also be a disservice to this Court, which is entitled to a thorough and polished presentation of the important issues involved.

In sum, Respondents have presented no sound reason to expedite this case (or the companion case from Illinois) in this extraordinary manner. If, contrary to Petitioners' view, the Wisconsin statute or trial present something beyond the *Stenberg* record, there will be time enough to address those differences in due course.

Respectfully submitted,

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Dated: February 10, 2000.